IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-241

ARPEJA-CALIFORNIA, INC.,

Petitioner,

v.

JARRET N. COHANE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Arpeja-California, Inc. petitions for a writ of certiorari to review a judgment of the District of Columbia Court of Appeals upholding the jurisdiction of the Superior Court of the District of Columbia over petitioner under the District of Columbia Long-Arm statute. The District of Columbia Court of Appeals rejected petitioner's contention that the exercise of jurisdiction violated the Due Process Clause of the Constitution.

OPINION BELOW

The findings of fact and opinion of the Superior Court is reproduced at pp. 4-6 *infra*. The opinion of the Court of Appeals is reported at 385 A.2d 153. It is reproduced in Appendix A hereto.

JURISDICTION

The judgment sought to be reviewed was entered on March 17, 1978. (Appendix B.) A timely petition for rehearing was denied on May 17, 1978 with two judges dissenting (Appendix C). The jurisdiction of the Court is conferred by 28 U.S.C. §1257(3).[1]

QUESTION PRESENTED

Whether a non-resident foreign corporation which does business in a state is, under the Due Process Clause, subject to suit in that state with respect to transactions that are unrelated to any business done in the forum state.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

D.C. Code §13-423 (the District of Columbia's long-arm statute) provides in pertinent part:

[1] The District of Columbia Court of Appeals is included within the term "highest court of a State" as used in 28 U.S.C. §1257. Although the petition draws into question the validity of a provision of the District of Columbia Code as interpreted by the District of Columbia Court of Appeals, review may be had in this Court only by certiorari, and not by appeal. *Palmore v. United States*, 411 U.S. 389 (1973)

"(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by any agent, as to a claim for relief arising from the person's . . .

"(1) transacting any business in the District of Columbia.

* * * * *

"(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him."

STATEMENT OF THE CASE

I.

THE PROCEEDINGS IN THE SUPERIOR COURT.

The present proceeding was commenced by a complaint filed in the Superior Court of the District of Columbia by the respondent, a salesman resident in Delaware, against the petitioner, a California corporation, for alleged loss of commissions. The cause of action was based on a contract of employment whereby petitioner employed respondent to sell petitioner's merchandise in the states of Pennsylvania, Delaware, Maryland, and the District of Columbia. The complaint made no allegation with respect to the place of the signing of the contract; the trial court subsequently found that the contract was negotiated in Dallas, Texas and executed in Wilmington, Delaware, but that no negotiations or transactions with respect to the contract took place in the District of Columbia (*infra* p. 5). The complaint alleged that the petitioner did business in the District of Columbia, but it did not allege that any of the damages allegedly suffered by respondent occurred as the result of any business transacted by the petitioner in the District of Columbia.

Petitioner filed a motion to dismiss the complaint on the grounds that on the face of the complaint the trial court lacked personal jurisdiction over the petitioner and that, in any event, the District of Columbia was an inappropriate forum. The trial court denied petitioner's motion and subsequently denied a motion to reconsider petitioner's contention that the court did not have jurisdiction.

The case came to trial on September 28, 1976. At the opening of the trial, counsel for petitioner renewed his contention that the court lacked jurisdiction and that the case should not be tried in the District of Columbia because of the nonresidency of the parties and the lack of any meaningful relationship between the parties, the subject matter and the District of Columbia. Respondent-plaintiff was then called to the stand and testified for approximately two hours.

Shortly before the conclusion of respondent's direct examination, the trial court recessed the trial and shortly thereafter dismissed the case on the ground of forum non conveniens. Through inadvertence, no transcript was made of the trial proceedings. The trial court subsequently made, pursuant to an order of the District of Columbia Court of Appeals, the following findings of fact and conclusions of law (emphasis supplied):

"Findings of Fact

"1. Appellant[2] is a resident of Wilmington, Delaware.

"2. Appellee is a corporation organized under the laws of the State of California with its principal place of business in Los Angeles, California.

[2] Appellant is the respondent here and Appellee is the petitioner.

"3. Neither of the parties maintained an office in the District of Columbia.

"4. The original written contract was negotiated between the parties in Dallas, Texas but was executed in Wilmington, Delaware by Appellant and mailed to Appellee in Los Angeles. The original contract submitted in Dallas, Texas had been modified and/or clarified by discussions between the parties accomplished by long distance telephone from Wilmington, Delaware to Los Angeles, California.

"5. The contract was for personal services to be performed by the Appellant in Pennsylvania, Delaware, Maryland and the District of Columbia and the supplying by Appellee of goods to retail outlets in those jurisdictions.

"6. *The relationship established by the contract and the parties thereto and its performance by the parties with the District of Columbia was minimal or insignificant.*

"7. The contentions of the Appellant would necessitate examination of and comparison with voluminous records of Appellee physically present in the court contained in large cartons, likely to require reference to the Auditor Master of the Court or some other form of accounting procedures.

"8. Appellant's case, as described in the opening statement of counsel, was to include the presentation of his own testimony and that of a witness from Baltimore, Maryland and the utilization of his own records and those of Appellee. The Appellee's presentation was to include the testimony of two officers of the corporation and the records of the corporation, both officers being residents of Los Angeles, California.

"9. Though the record reveals that Appellee had previously filed a motion to dismiss and to quash

service, which included a reliance upon the statute providing for the application of the doctrine of forum non conveniens in the District of Columbia, the principal thrust of that motion was directed to the issue of lack of jurisdiction. The previous judge, the Honorable DeWitt Hyde, passing upon said motion and denying same, did not have before him the total factual picture as developed early in this trial and found as factors hereinabove at the time of his ruling.

"Conclusions of Law

"I. By reason of the Findings of Fact numbered 1 through 4, *the lack of any significant relationship between the District of Columbia and the parties and the subject matter of this litigation,* the nature of the contract, the necessity of applying foreign law (Contract & Damages) to litigation requiring extensive examination of and computation of records and with judicial knowledge of the calendar in the overburdened Superior Court and giving recognition to the rights of citizens of the District of Columbia to have primary access to the court, the court concludes the Doctrine of Forum Non Conveniens should be applied and the case dismissed.

"II. Though this court had jurisdiction, as previously determined by the denial of Appellee's motion to dismiss, the court was not foreclosed by the Law of the Case Doctrine from dismissing on Forum Non Conveniens under the totality of the circumstances herein."

II.

THE PROCEEDINGS IN THE COURT OF APPEALS.

Respondent appealed the trial court's dismissal to the District of Columbia Court of Appeals. In its brief urging affirmance of the dismissal by the trial court, petitioner

contended that the trial court lacked jurisdiction under the District of Columbia long-arm statute, since respondent had failed to allege or show that he had lost commissions as the result of sales in the District of Columbia, and the long-arm statute expressly required that any claim for relief *must* arise from the transaction of business in the District. Petitioner further contended that any other interpretation of the statute would violate the standards of due process as laid down by this Court in *International Shoe v. Washington,* 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957); and *Hanson v. Denckla,* 357 U.S. 235 (1958).

The Court of Appeals reversed the judgment below finding that the trial court had abused its discretion in dismissing the case on the ground of forum non conveniens after the trial had begun.[3] The court also rejected petitioner's jurisdictional argument holding that, since respondent alleged that sales were made in the District of Columbia, it was not necessary that the respondent also allege that the claim for relief arise from those sales (see Appendix A p. 13a). The court also expressly held that the "exercise of jurisdiction in the present case does not offend due process" (Appendix A p. 13a).

Petitioner filed a timely petition for rehearing in which it contended that the exercise of jurisdiction violated due

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[3] This ruling was in direct conflict with a decision of the United States Court of Appeals in *Nee v. Dillon,* 99 U.S. App. D.C. 332, 239 F.2d 953 (1956) to the effect that a trial court had a *duty* to dismiss on forum non conveniens ground where facts adduced at trial showed that this was proper. This doctrine, enunciated in the *Nee* case, was subsequently reaffirmed by the District of Columbia Court of Appeals in *Welsh v. Crescent Hill Co.,* 134 A.2d 653, 654 (D.C. Ct. App. 1957); *Frost v. Peoples Drug Stores Incorporated,* 327 A.2d 810, 813 (D.C. Ct. App. 1974); and *District Realty Title Insurance Corp. v. Goodrich,* 328 A.2d 93, 94-95 (D.C. Cir. App. 1974).

process (1) because the complaint failed to allege that any commissions were lost as the result of any transactions in the District of Columbia and (2) in light of the express finding of the trial court that "The relationship established by the contract and the parties thereto and its performance by the parties with the District of Columbia was minimal or insignificant" (*supra* p. 5). The petition for rehearing was denied by an en banc court with two judges dissenting (Appendix C).

REASONS FOR ALLOWING THE WRIT

1. This case is another in the series of cases which have reached this Court in recent terms testing the issue of the due process limitations on the jurisdiction of state courts over non-residents. *Shaffer v. Heitner,* 433 U.S. 186 (1977); *Kulko v. Superior Court of California,* 436 U.S. ——, decided May 15, 1978; *U-Anchor Advertising Inc. v. Burt,* 553 S.W.2d 760 (Texas 1977), *cert. den.* 434 U.S. 1063 (1978); *Southern Idaho Pipe & Steel v. Cal-Cut Pipe,* 567 P.2d 1246 (Idaho 1977), *cert. den.* 434 U.S. 1056 (1978). The present case is particularly significant since it involves an interpretation and application of the Uniform Interstate and International Procedures Act, popularly known as the "long-arm" statute, which has been adopted in practically every state. See Vol. 13 Uniform Laws Annotated p. 285 §1.03.

2. Practically all jurisdictions which have adopted "long-arm" statutes have interpreted these statutes as granting jurisdiction to state courts to the "outer limits" permitted by the Due Process Clause. See *e.g., Pickens v. Hess,* 573 F.2d 380 (6th Cir. 1978, interpreting Tennessee statute); *Envir. Res. Inst. Inc. v. Lockwood Greene Eng. Inc.,* 355 A.2d 808 (D.C. Ct. App. 1976, stating that this is the rule in Maryland, Virginia and the District

of Columbia); *Carmack v. Chemical Bank New York Trust Co.,* 536 P.2d 897 (Okla. 1975); *U-Anchor Advertising Inc. v. Burt, supra* (Texas); *Southern Idaho Pipe & Steel v. Cal-Cut Pipe, supra* (Idaho). Accordingly, although the decision below involves an interpretation and application of a provision of the D. C. Code, unless reviewed by this Court, the decision will stand as a precedent for the permissible constitutional application of the long-arm statutes in states throughout the country.

The District of Columbia long-arm statute, like the Uniform Act, has built within it two provisions which are designed to keep the application of the statute within the constitutional limits of the due process requirements as set out by this Court. Paragraph (a) of the statute limits jurisdiction to a claim for relief *arising from* a person's transacting any business in the District of Columbia and paragraph (b) states expressly that (emphasis supplied):

> "When jurisdiction over a person is based solely on this section, *only a claim for relief arising from acts enumerated in this section may be asserted against him.*"

These limitations on jurisdiction as written into the statute are obviously required by the decisions of this Court permitting jurisdiction over non-residents under circumstances where the non-resident comes into the foreign jurisdiction. Thus, this Court stated in *International Shoe, supra* at 319 (emphasis supplied):

> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, *so far as those obligations arise out of or are connected with the activities within the state,* a procedure which requires the

corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

The rule was stated as follows in *McGee v. International Life Ins. Co., supra* at 223: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." In *Hanson v. Denckla, supra,* the Court elaborated as follows on the trend to expand jurisdiction over non-residents (at 251-252 emphasis supplied):

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him.
>
> * * * * *
>
> *"The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State.* In that respect, it differs from McGee v. International Life Ins. Co. . . . *Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida."*

And in *Shaffer v. Heitner, supra,* this Court repudiated its earlier doctrine that the presence of property in a foreign jurisdiction can serve as the basis of jurisdiction, holding that that fact alone cannot serve as the basis of jurisdiction unless the property is the subject matter of the litigation or in some way relates to the underlying cause of action.

Thus, it is plain that the language of the statute limiting jurisdiction to claims that are related to business done in a forum state is a constitutional requirement and cannot be read out of the statute as a mere matter of statutory interpretation. Accordingly, the lower court's interpretation of the statute so as to permit the exercise of jurisdiction over claims for relief that did not arise from transactions in the District of Columbia is in conflict with the due process requirements for jurisdiction over a nonresident as laid down by this Court.

3. The decision below conflicts with the decisions of courts from other jurisdictions construing their long-arm statutes. These courts have consistently held that the statutes confer jurisdiction only with respect to claims arising from transactions in the forum state. See *e.g., L.D. Reeder Contractors of Arizona v. Higgins Industries, Inc.,* 265 F.2d 768 (9th Cir. 1959, applying California Law); *Forsythe v. Overmeyer,* 576 F.2d 779 (9th Cir. 1978, California law); *Pickens v. Hess, supra* (applying Tennessee law); *Lindley v. St. Louis-San Francisco Railway Company,* 407 F.2d 639 (7th Cir. 1968, applying Illinois law); *Precision Polymers Inc. v. Nelson,* 512 P.2d 811 (Okla. 1973), *Scott Paper Company v. Scott's Liquid Gold, Inc.,* 374 F. Supp. 184 (D. Delaware, 1974).

4. The importance of this issue to enterprises such as petitioner's is manifest. Petitioner is a California corporation that manufactures clothes and sells merchandise to retail establishments throughout the country. Under the reasoning of *International Shoe* and its progeny, petitioner recognizes that, when it sells merchandise in the District of Columbia or any state, it enjoys privileges granted by the laws of that state and as a consequence subjects itself to the jurisdiction of the courts of that state with regard to any cause of action arising

out of its activities in that state. It is unreasonable, however, to hold that by selling merchandise in the District of Columbia, petitioner subjects itself to the jurisdiction of the District of Columbia with respect to causes of action that arise from its selling merchandise in Pennsylvania, Maryland, Delaware or any state other than the District of Columbia. Petitioner sells its merchandise in most states of the Union. The logic of the holding below would permit petitioner to be sued in any state where it sold merchandise even though the claim for relief had no relation to the sales made in that jurisdiction.

Nor is there anything in the facts of the present case that can justify this unwarranted expansion of jurisdiction. The complaint against petitioner did not allege that any damage resulted to the respondent as a consequence of anything that petitioner did in the District of Columbia; it alleged only that petitioner contracted with respondent to solicit orders in the District of Columbia and in fact made sales to stores in the District. Further, the trial court expressly found that "The relationship established by the contract and the parties thereto and its performance by the parties with the District of Columbia was minimal or insignificant." [4] To subject petitioner, under these circumstances, to the jurisdiction of the District of Columbia courts for alleged loss of commissions as the result of sales in Pennsylvania, Maryland and Delaware is clearly unreasonable and not in conformance with the due process requirements as laid down by this Court.

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[4] The trial court also found that there was a "lack of any significant relationship between the District of Columbia and the parties and the subject matter of this litigation" (*supra* p. 6).

CONCLUSION

Certiorari should be granted and the judgment below should be reversed with directions to dismiss the complaint for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11611

JARRET N. COHANE, APPELLANT,

v.

ARPEJA-CALIFORNIA, INC., APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. William E. Stewart, Jr., Trial Judge)

(Argued September 28, 1977 Decided March 17, 1978)

Arnold Rochvarg with whom *Philip L. Cohan* was on the brief, for appellant.

David Rein for appellee.

Before KELLY, YEAGLEY and MACK, *Associate Judges.*

YEAGLEY, *Associate Judge*: This appeal is from an order of the trial court dismissing a breach of contract action in midtrial on *forum non conveniens* grounds.[1] We find that under the circumstances of this case, dismissal was inappropriate.

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[1] Because of the inability of the court reporter to supply a transcript of the proceedings below, this court requested the trial court to submit a statement of proceedings and evidence. Our discussion of this case is based on that statement.

Appellant Jarret N. Cohane, a salesman and resident of Delaware, brought suit against appellee Arpeja-California, Inc., a California corporation engaged in the business of manufacturing women's apparel. Appellant was employed by Arpeja-California as an independent agent and assigned to travel the area of eastern Pennsylvania, Maryland, Delaware, and Washington, D.C., selling the Young Edwardian line of Arpeja's clothing. He claimed that pursuant to his employment contract, as orally modified, he was entitled to certain commissions which appellee failed to pay.

On June 23, 1975, appellee filed a motion to dismiss the complaint on the grounds [2] that the trial court did not have personal jurisdiction over it and that the District of Columbia was an inappropriate forum.[3] Appellee's motion was denied after a hearing before the Superior Court and a motion to reconsider was filed.[4] After additional argument, the court again denied the motion to dismiss. Appellee did not appeal this ruling.

The parties then proceeded with discovery. Depositions were taken in California and the District of Columbia,

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[2] Appellee also claimed that dismissal was mandated by the District of Columbia Statute of Frauds, D.C. Code 1973, § 28-3502. That issue is not before us.

[3] The District of Columbia *forum non conveniens* statute, D.C. Code 1973, § 13-425 provides:

> When any District of Columbia court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss such civil action in whole or part on any condition that may be just.

[4] Appellee did not raise the *forum non conveniens* argument in the motion to reconsider, but contended only that the court did not have jurisdiction over it under the District of Columbia "long arm" statute, D.C. Code 1973, § 13-423.

and appellee submitted two sets of interrogatories to appellant. During the course of discovery, several motions were filed with the Superior Court.

The parties were called to trial on September 27, 1976. Cohane appeared with his counsel and a witness from Baltimore, Maryland. Appellee appeared in the person of its president and vice-president, both from California, together with counsel. Both sides announced "ready" and awaited assignment of a trial judge. Unfortunately, no cases were assigned for trial that day. At 5 p.m., the parties appeared before Judge William E. Stewart, Jr., who was sitting as motions judge. When Judge Stewart learned of the circumstances of the case, he agreed to try it himself at 8 a.m. the following morning.

On the morning of September 28, 1976, the witnesses, parties and counsel appeared before Judge Stewart. In his opening argument, counsel for appellee contended that the court lacked jurisdiction and that the case should not be tried in this jurisdiction because of the nonresidency of the parties and the lack of any substantial relationship between the parties, the subject matter, and the District of Columbia. Cohane was then called to the stand and proceeded to give testimony.

At approximately 10:30 a.m., the court interrupted the direct examination of appellant and asked counsel for appellant to state his contentions as to which jurisdiction's law governed the interpretation of the contract and the claim for damages. Counsel's response was that he assumed the applicable principles to be the same in every jurisdiction. After a short recess, the court made oral findings of fact and conclusions of law which culminated in the dismissal of the action on grounds of *forum non conveniens*.

Judge Stewart subsequently made, pursuant to an order of this court, the following written findings of fact and conclusions of law:

FINDINGS OF FACT

1. Appellant is a resident of Wilmington, Delaware.

2. Appellee is a corporation organized under the laws of the State of California with its principal place of business in Los Angeles, California.

3. Neither of the parties maintained an office in the District of Columbia.

4. The original written contract was negotiated between the parties in Dallas, Texas but was executed in Wilmington, Delaware by Appellant and mailed to Appellee in Los Angeles. The original contract submitted in Dallas, Texas had been modified and/or clarified by discussions between the parties accomplished by long distance telephone from Wilmington, Delaware to Los Angeles, California.

5. The contract was for personal services to be performed by the Appellant in Pennsylvania, Delaware, Maryland and the District of Columbia and the supplying by Appellee of goods to retail outlets in those jurisdictions.

6. The relationship established by the contract and the parties thereto and its performance by the parties with the District of Columbia was minimal or insignificant.

7. The contentions of the Appellant would necessitate examination of and comparison with

voluminous records of Appellee physically present in the court contained in large cartons, likely to require reference to the Auditor Master of the Court or some other form of accounting procedures.

8. Appellant's case, as described in the opening statement of counsel, was to include the presentation of his own testimony and that of a witness from Baltimore, Maryland and the utilization of his own records and those of Appellee. The Appellee's presentation was to include the testimony of two officers of the corporation and the records of the corporation, both officers being residents of Los Angeles, California.

9. Though the record reveals that Appellee had previously filed a motion to dismiss and to quash service, which included a reliance upon the statute providing for the application of the doctrine of forum non conveniens in the District of Columbia, the principal thrust of that motion was directed to the issue of lack of jurisdiction. The previous judge, the Honorable DeWitt Hyde, passing upon said motion and denying same, did not have before him the total factual picture as developed early in this trial and found as factors hereinabove at the time of his ruling.

CONCLUSIONS OF LAW

I. By reason of the Findings of Facts numbered 1 through 4, the lack of any significant relationship between the District of Columbia and the parties and the subject matter of this litigation, the nature of the contract, the necessity of applying foreign law (Contract & Dam-

ages) to litigation requiring extensive examination of and computation of records and with judicial knowledge of the calendar in the overburdened Superior Court and giving recognition to the rights of citizens of the District of Columbia to have primary access to the court, the court concludes the Doctrine of Forum Non Conveniens should be applied and the case dismissed.

II. Though this court had jurisdiction, as previously determined by the denial of Appellee's motion to dismiss, the court was not foreclosed by the Law of the Case Doctrine from dismissing on Forum Non Conveniens under the totality of the circumstances herein.

I.

Appellant contends that the trial court's sua sponte dismissal of this action was an abuse of discretion. After careful analysis of the relevant factors, we find that the trial court erred in ordering the midtrial dismissal of appellant's claims on the grounds that the District of Columbia was an inappropriate forum.[5]

It is well settled in this jurisdiction that decisions on questions of *forum non conveniens* are committed to the sound discretion of the trial court and will be reversed

[5] In view of this disposition of the *forum non conveniens* issue, we find it unnecessary to pass upon appellant's contention that the trial court was foreclosed from dismissing the case on this ground, because of the failure of defendant to exercise his right under *Frost v. Peoples Drug Store, Inc.*, D.C.App., 327 A.2d 810, 811-13 (1974), to appeal the order of the motions court rejecting defendant's original motion to dismiss.

on appeal only upon a clear showing of an abuse of discretion. *E.g., Florida Education Association v. National Education Association*, D.C.App., 354 A.2d 853, 854 (1976); *Frost v. Peoples Drug Store, Inc.*, D.C.App., 327 A.2d 810, 813 (1974). This broad discretion is not unlimited, however, and this court will examine the trial court's action in light of well established criteria for applying the doctrine. *Carr v. Bio-Medical Applications of Washington, Inc.*, D.C.App., 366 A.2d 1089, 1092 (1976); *Dorati v. Dorati*, D.C.App., 342 A.2d 18, 20 (1975). Foremost among those criteria is the principle that "unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

This court carefully analyzed the factors to be considered in determining whether an action should be dismissed on *forum non conveniens* grounds in *Carr v. Bio-Medical Applications of Washington, Inc., supra* at 1092. We said:

> In the landmark case of *Gulf Oil Corp. v. Gilbert*, the Supreme Court identified two separate interests which must be considered in assessing a motion to dismiss for forum non conveniens—the private interest of the litigant, and the public interest. Factors relevant to the private interest concern the ease, expedition, and expense of the trial, and include the relative ease of access to proof; availability and cost of compulsory process; the enforceability of a judgment once obtained; evidence of an attempt by the plaintiff to vex or harass the defendant by his choice of the forum; and other obstacles to a fair trial. . . . Likewise, the public interest is a relevant consideration in applying the doc-

> trine. Factors related to the public interest include administrative difficulties caused by local court dockets congested with foreign litigation; the imposition of jury duty on a community having no relationship to the litigation; and the inappropriateness of requiring local courts to interpret the laws of another jurisdiction.

Usually when we review a *forum non conveniens* dismissal, the trial court's ruling has come in response to a pre-answer motion to dismiss. In such a case, the parties have not been put to the expense of discovery and the witnesses have not been brought to the forum for trial. Therefore, the appropriateness of dismissal is determined merely by weighing the factors outlined in *Carr*. *See Dorati v. Dorati, supra.* When, however, the parties and the court have expended their time, effort and money preparing for trial, other considerations enter the picture and the *Carr* factors are no longer dispositive. Thus in *Wilburn v. Wilburn*, D.C.App., 192 A.2d 797 (1963), we reversed when the trial court dismissed on *forum non conveniens* grounds 16 months after concluding a two-day trial. We said:

> It is not helping to relieve congested court calendars by holding the precise trial which the doctrine in part seeks to avoid, and then claiming inconvenience. We find that the trial court abused its discretion when after months of preparation, motions, pre-trial, and a full hearing consuming two days' time, it sua sponte dismissed the complaint on the ground of *forum non conveniens*. [*Id.* at 801.]

Wilburn emphasized the significance which must be given to the timing of a *forum non conveniens* motion.

In this case, the trial court dismissed in midtrial. As in *Wilburn*, the dismissal came after months of preparation, motions, and pre-trial proceedings. The witnesses were in the courtroom prepared to proceed.

Of course, we recognized in *Wilburn* that situations would arise occasionally in which dismissal on *forum non conveniens* grounds would be appropriate even at the trial stage. Those, however, will be rare cases arising only where the public and private interest, as defined in *Carr*, weigh overwhelmingly in favor of dismissal. We find that this is not such a case.

Here, the private interest was not clearly served by dismissal. Continuation of the trial would not have been difficult or expensive.[6] Only four witnesses were scheduled to testify and appellant had already completed part of his testimony. Moreover, this is not a case in which access to proof or the availability of compulsory process was a problem. All of the witnesses, records and documents were present in the courtroom. Finally, there did not appear to be any problem of enforcing the judgment, nor was there any indication that the suit was brought in the District of Columbia in order to harass appellee.

Whether the public interest was served by dismissing this action is a more complex question. On the one hand, the trial court noted that appellant's claims would require examination and comparison of voluminous records and perhaps reference to the Auditor Master of the court.

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[6] Appellee argues in its brief that the trial would have been extremely difficult. Appellee's position is that the trial would have been spread out piecemeal and interspaced between the trial judge's other duties and could have taken a week or more. We note that the trial judge did not mention this factor in his findings and conclusions of law.

This would have taken court time and added to the backlogged civil calendar in the Superior Court. Also, there was the likelihood that the trial court would be faced with the task of applying foreign law. On the other hand, the public interest is not served when an action which already has utilized a substantial amount of court time is aborted in midtrial.

Under the circumstances, we find that the *Carr* factors did not overwhelmingly favor dismissal in midtrial and hence that the trial court abused its discretion.

II.

Appellee argues that even if the trial court abused its discretion in dismissing on *forum non conveniens* grounds, the dismissal was appropriate because the court lacked jurisdiction over it.

Before a court may properly assert personal jurisdiction over a nonresident defendant, service of process over the nonresident must be authorized by statute and be within the confines of the due process clause of the United States Constitution. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The District of Columbia "long arm" statute provides:

> § 13-423. Personal jurisdiction based upon conduct
>
> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> (1) transacting any business in the District of Columbia;
>
> . . . .

> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

Our cases have interpreted this statute as permitting the exercise of personal jurisdiction over nonresident defendants to the extent permitted by the due process clause. *E.g., Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, D.C.App., 355 A.2d 808, 810-11 (1976).

Under § 13-423(a)(1), less of a nexus between the defendant and the District of Columbia is required for a finding of jurisdiction than would be required under the "doing business" test used to determine corporate presence. *International Shoe Co. v. Washington, supra.* All that is required is some affirmative act by which the defendant brings itself within the jurisdiction and establishes minimum contacts. *Hanson v. Denckla*, 357 U.S. 235 (1958). However, under § 13-423(a)(1) and the doctrine of *International Shoe*, a finding that the defendant has "transacted business" in the District of Columbia does not result in unlimited jurisdiction. Instead, jurisdiction is limited to claims arising from the particular transaction of business which provides the basis for jurisdiction. D.C. Code 1973, § 13-423(b). In other words, the statute would not grant the Superior Court jurisdiction over a nonresident defendant with respect to a claim arising from a shipment of goods to a purchaser in Pennsylvania, solely on the ground that the defendant had also shipped goods to purchasers in the District.

In the present case, appellant was a salesman for appellee with a territory covering eastern Pennsylvania, Maryland, Delaware and the District of Columbia. Ap-

pellee concedes that by shipping goods to the District of Columbia, it may have subjected itself to a suit in the Superior Court by appellant for the loss of commissions arising from the District of Columbia sales. Appellee contends, however, that appellant's present claim of lost commissions arises out of his activities in Pennsylvania, Maryland and Delaware as well as the District of Columbia. Appellee further argues that since appellant failed to allege specifically in his complaint, or otherwise show, that some of the commissions he lost were a result of sales in the District of Columbia he did not carry his burden of setting forth jurisdictional facts which would support jurisdiction under the provisions of § 13-423.

In our view, appellee's contentions are based on an erroneous interpretation of § 13-423. The limitation in § 13-423(b) that the claim for relief must arise from the transaction of business in the District of Columbia is meant to prevent "the assertion of claims in the forum state that do not bear some relationship to the acts in the forum state relied upon to confer jurisdiction." *Malinow v. Eberly*, 322 F. Supp. 594, 599 (D.Md. 1971). Once, however, the claim is related to acts in the District, § 13-423 does not require that the scope of the claim be limited to activity within this jurisdiction.

This view is supported by the legislative history of § 13-423. The District of Columbia "long arm" statute is modeled after the Uniform Interstate and International Procedure Act. *See Founding Church of Scientology, Etc. v. Verlag*, 175 U.S.App.D.C. 402, 405, 536 F.2d 429, 432 (1976). The note of the Commissioners on Uniform State Laws states in reference to the Uniform Act counterpart of § 13-423:

> The concept of cause of action or claim for relief should be broadly construed to cover an

> entire transaction so that, when possible, the entire dispute may be settled in a single litigation. Subdivision (b) is designed to prevent assertion of independent claims *unrelated to any activity described* in subdivision (a) of § 103. [13 U.L.A. § 103 at 288 (1975) (emphasis supplied).]

In the present case, appellant alleged in his complaint that appellee sold to clothing stores in the District of Columbia and received payment for those sales. Appellee also contracted with appellant to solicit orders and sell goods here. In the affidavit filed in support of appellee's motion to dismiss, appellee did not deny that appellant's claim arose, in part at least, out of sales in the District of Columbia. We find that appellant alleged sufficient facts to support jurisdiction under § 13-423. *Mosley v. Nationwide Purchasing, Inc.*, 485 F.2d 418 (Temp. Emer. Ct. App. 1973).

Finally, we find that our exercise of jurisdiction in the present case does not offend due process. As the Supreme Court indicated in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957), "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state." *See generally Shaffer v. Heitner*, 97 S.Ct. 2569 (1977).

Accordingly, the judgment below is

Reversed and remanded for proceedings consistent with this opinion.

APPENDIX B

[Filed March 17, 1978]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11611

JANUARY TERM, 1978

JARRET N. COHANE,

Appellant,

v.

ARPEJA-CALIFORNIA, INC.,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

BEFORE: Kelly, Yeagley and Mack, Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment on appeal is reversed and this cause is remanded for further proceedings consistent with the opinion filed this date.

PER CURIAM.

For the Court:

/s/ Hugh E. Kline
Hugh E. Kline.
Chief Deputy Clerk.

Dated: March 17, 1978

Opinion per Associate Judge J. Walter Yeagley.

APPENDIX C

[Filed May 17, 1978]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11611

JARRET N. COHANE,

Appellant,

v.

ARPEJA-CALIFORNIA, INC.,

Appellee.

CA 4653-75

BEFORE: *Kelly, Kern, Gallagher, Nebeker, *Yeagley, Harris, *Mack, and Ferren, Associate Judges.

ORDER

On consideration of appellee's petition for rehearing en banc, and it appearing that a majority of the judges of this Court having voted to deny the petition, it is

ORDERED that appellee's petition is denied.

PER CURIAM.

*Associate Judges Nebeker and Harris would vote to grant the petition.

Copies to:

Honorable William E. Stewart, Jr.
Clerk, Superior Court

Philip L. Cohan, Esquire
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1700 Pennsylvania Avenue NW, 20006

David Rein, Esquire
733 15th Street, NW, 20005

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-241

ARPEJA-CALIFORNIA, INC.,

Petitioner,

v.

JARRET N. COHANE,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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IN THE

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OCTOBER TERM, 1978

No. 78-241

ARPEJA-CALIFORNIA, INC.,

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Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

In this Memorandum, respondent Jarret N. Cohane accepts the "Opinion Below" and the "Statement of the Case" found in the Petition.

JURISDICTION

In asserting jurisdiction under 28 U.S.C. §1257(3), Petitioner simply passes over the question of whether the judgment appealed from is "final" within the

meaning of this statute. We note at the outset that the judgment appealed from was clearly not "final" as a matter of fact since it obviously did not "dispose of the litigation."[1] We recognize that there are exceptions to the finality rule and that this Court has recognized such exceptions in the context of the kind of jurisdictional issue presented in this case. *Shaffer v. Heitener*, 433 US 186 (1977).[2] The question is the breadth of the exception which *Shaffer* recognized. We suggest that the *Shaffer* holding should be limited to the peculiar situation under Delaware law described in footnote 12 of that opinion (433 US at 195-196). Indeed, if *Shaffer* is not so limited, every denial of a motion to dismiss for lack of jurisdiction under the rule of *International Shoe Co. v. Washington*, 326 US 310 (1945) would possess the requisite finality.

QUESTION PRESENTED

Did the trial court have jurisdiction to entertain a suit for breach of contract against a nonresident foreign corporation where the contract required partial performance in the forum state and such performance was in fact done in the forum state?

[1] Indeed, the trial court, having twice previously denied a motion to dismiss for lack of jurisdiction, dismissed the complaint in the midst of plaintiff's testimony on the ground of forum non conveniens. Certainly a completed trial record would benefit this Court, as well as the courts below, in judging whether Petitioner's contacts with the forum were such as to properly subject it to trial there.

[2] Petitioner's awareness of *Shaffer* (Petition, p. 8 and 10) makes its avoidance of this issue all the more significant.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

28 U.S.C. §1257 provides in pertinent part:

> *Final judgments* or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By Writ of Certiorari, where . . . the validity of a state Statute is drawn and questioned on the ground of its being repugnant to the Constitution . . . of the United States. (emphasis added)[3]

REASONS FOR NOT ALLOWING THE WRIT

1. Petitioner's argument that the decision of the District of Columbia Court of Appeals conflicts with *McGee v. International Life Insurance Co.*, 355 US 220 (1957), misconstrues the facts of this case and the holding of *McGee*. The record is undisputed that the contract between Petitioner and Respondent required performance (sales) in the District of Columbia as well as four other states and that sales were in fact made in the District of Columbia. Petitioner argues, however, that "the complaint failed to allege that any commissions were lost as the result of any transactions in the District of Columbia" (Petition at p. 8). Based "on the record" the District of Columbia Court of Appeals disposed of that argument in the following words:

> In the present case, appellant alleged in his complaint that appellee sold to clothing stores in

[3] The relevant sections of the Fifth Amendment and D.C. Code Section 13-423 (the District of Columbia's Long-Arm Statute) are set forth in the Petition at pages 2-3.

> the District of Columbia and received payment for those sales. Appellee also contracted with appellant to solicit orders and sell goods here. In the affidavit filed in support of appellee's motion to dismiss, appellee did not deny that appellant's claim arose, in part at least, out of sales in the District of Columbia.

Based on the law, the Court of Appeals correctly affirmed the lower Court's jurisdiction by relying upon *McGee:*

> Finally, we find that our exercise of jurisdiction in the present case does not offend due process. As the Supreme Court indicated in *McGee v. International Life Insurance Co.*, 355 US 220 (1957), "[i]t is sufficient for purposes of due process that the suit was based on a contract which has substantial connection with that state." See generally *Shaffer v. Heitner*, 97 S.Ct. 2569 (1977).[5]

2. Respondent further submits that even through the complaint satisfactorily alleges that the claim arose at least in part from District of Columbia sales made pursuant to the contract, such allegations were unnecessary. To the contrary, it would have been sufficient to allege that the claim arose from the contract rather than specified sales. Accordingly, even if Respondent's claim for unpaid commissions were based solely on sales in other states in which he was also obliged to make sales, the fact that such sales were pursuant to a contract which also required performance in the forum state is itself sufficient to confer jurisdiction at least where work was performed in the forum state. *McGee v. International Life Insurance Co., supra.*

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[4] *Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 159, Appendix A to Petition at 13a.

[5] *Id.*

3. Petitioner's argument that the issue presented here is "important" is patently contrived. Essentially this argument has two premises. The first is that this decision is important simply because it affects multistate businesses; but, of course, so do all decisions involving jurisdiction over nonresident corporations. The second premise is that because this case requires an interpretation of a statute similar to the Uniform Interstate and International Procedures Act, its effect will be felt in virtually every state. That is not so because no state is required to follow a decision of the District of Columbia Court of Appeals. Indeed Petitioner is simply requesting this Court to give an advisory opinion to those States bound by the Act.

CONCLUSION

The foregoing demonstrates that the Petitioner's substantive argument on the Constitutional issue is frivolous and the claimed "importance" of the issue presented is purely contrived. Indeed, the only question of any substance is whether this Court even has jurisdiction under Section 28 U.S.C. §1257(3) to consider this matter.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

No. 78-241

ARPEJA-CALIFORNIA, INC.,

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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1. Jurisdiction.

The opposition suggests (pp. 1-2) that the judgment below may not be "final" within the meaning of 28 U.S.C. §1257. This suggestion has no merit. The Court below expressly held that jurisdiction existed under the District's long-arm statute so long as sales were made by petitioner in the District of Columbia even though there was no allegation by respondent that his claim for relief arose out of those sales (Appendix A p. 13a). And the respondent acknowledges (Opp. 4) that his contention

that the District of Columbia court has jurisdiction does not rest on any allegation that his claim for relief arose from sales made in the District of Columbia.[1] Accordingly, the court below has finally decided the federal question, i.e., whether a foreign corporation is subject to suit with respect to transactions that are unrelated to business done in the forum state.

This Court has repeatedly held that where a federal claim of lack of jurisdiction has been determined by a state court, that decision is "final" for the purposes of 28 U.S.C. §1257, even though the merits of the dispute under state law is still unresolved. *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555 (1963); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Cf. *Madruga v. Superior Court*, 346 U.S. 556 (1954); *Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor*, 266 U.S. 200 (1924). As stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975), the rule that this Court will take jurisdiction where the federal question has been finally decided even if the case has still to be determined on non federal

[1] Respondent makes the feeble suggestion that "a completed trial record would benefit this Court . . . in judging whether Petitioner's contracts with the forum were such as to properly subject it to trial there." (Opp. p. 2 fn. 1.) But respondent did not contend below and does not represent here that his claim for relief is in any way based on sales in the District of Columbia. Moreover, the trial court after hearing respondent's evidence found that: "The relationship established by the contract and the parties thereto and its performance by the parties with the District of Columbia was minimal or insignificant" (App. 4a), and that there was a "lack of any significant relationship between the District of Columbia and the parties and the subject matter of the litigation" (App. 5a). Significantly, respondent makes no representation that it has additional evidence to offer on the issue of the relationship between his claim and the District of Columbia.

grounds "is consistent with the pragmatic approach that we followed in the past in determining finality." See Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) 185.

The opposition further contends (p. 2) that permitting review from a denial of a motion to dismiss on jurisdictional grounds is somehow inconsistent with the rule of "finality". The identical contention was rejected by Justice Goldberg in chambers. Justice Goldberg read the cases in this Court as holding unequivocally that an assertion of in personam jurisdiction under the provisions of a state's long-arm statute against a claim of a denial of due process is a final judgment. *Rosenblatt v. American Cyanamid Corp.*, 15 L.Ed. 2d 39, 86 S.Ct. 1 (1965). And in *Mercantile Nat. Bank v. Langdeau, supra* at 558, the Court said: ". . . we believe it serves the policy underlying the requirement of finality in 28 U.S.C. §1257" to determine the question of jurisdiction rather than to submit the parties to litigation which "may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." So here, if jurisdiction in personam over the petitioner does not exist, there is no reason to require the petitioner's officers to come from California to the District of Columbia to try on the merits a fruitless litigation.

2. Importance of the Issue.

We stated in our petition that the issue presented in this case was important because it involved the construction and application of the District of Columbia's long-arm statute which is substantially the same as the long-arm statutes for most of the states throughout the country. The respondent replies with the frivolous argument that "no state is required to follow a decision of the

District of Columbia's Court of Appeals" (Opp. 5). But no state is bound to follow the decisions of the highest court of any other state. By the respondent's logic no decision of the highest court of any state would ever be sufficiently important to justify review by this Court.

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